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IN THE

Supreme Court of the United States

October Term 1935.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of ROY C. RAMBO, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Now comes the Chicago Great Western Railroad Company and presents this, its petition for a Writ of Certiorari, to be issued to the Supreme Court of the State of Minnesota to review the judgment entered therein on the 14th day of November, 1935 in the above entitled cause, affirming a judgment in the amount of $15,800.72 entered by the District Court of Dakota County, Minnesota, on the 28th day of March, 1935, in favor of the respondent and against the petitioner in an action brought by said respondent against the petitioner to recover damages for the death of Roy C. Rambo, deceased intestate.

A duly certified copy and ten uncertified copies of the entire record, including all the proceedings in the District Court of Dakota County, Minnesota, where said cause was tried, and in the Supreme Court of the State of Minnesota, to which an appeal was taken from the judgment of said District Court, are filed herewith under separate cover, and your petitioner respectfully shows to the Court:

(Figures in parenthesis refer to pages of the printed record.)

STATEMENT OF QUESTIONS PRESENTED.

The questions presented in this case are:

1. Whether there was sufficient evidence to sustain a finding of a violation of the Federal Boiler Inspection Act (U. S. C. A. Title 45, Sec. 23; Act of June 7, 1924; c. 355, Sec. 2, 43 Stat. 659) where the only evidence of a defective headlight in violation of said Act was the testimony of the engineer that he did not see deceased within 800 feet, and where it was not shown that the engineer was looking 800 feet ahead of the engine, and where the headlight was shown to be in perfect condition in compliance with the Act before and immediately after the accident.

2. Whether, even if the headlight were defective, it was the proximate cause of the accident.

3. Whether the negligence of the deceased employe was not the sole cause of his injury.

STATUTES INVOLVED.

The statutes involved are the Federal Boiler Inspection Act, to-wit: U. S. C. A., Title 45, Sec. 23, Act of June 7, 1924, c. 355, Sec. 2, 43 Stat. 659, reading as follows:

> "It shall be unlawful for any carrier to use or to permit to be used on its line any locomotive unless said lo-

comotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive and its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30 and 32, and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for,"

And,

The rule of the Interstate Commerce Commission, adopted pursuant to the provisions of said Act, reading as follows, to-wit:

(Rule 29, R. 297 & 310).

"Locomotives used in road service—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive, who possesses the usual visual capacity required of locomotive enginemen to see in a clear atmosphere a dark object as large as a man of average size, standing erect, at a distance of at least 800 feet ahead and in front of such headlight, and such headlight must be maintained in good condition."

And,

The Federal Employers Liability Act, to-wit, the Act of April 22, 1908, Chap. 149, Sec. 1, 35 Stat. 65, U. S. C. A. Title 45, Sec. 51, reading as follows:

"Every common carrier by railroad, while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states

or territories, or between the District of Columbia or any of the states or territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

SHORT SUMMARY STATEMENT OF THE FACTS.

Deceased, Roy C. Rambo, was a signal maintainer for the Railroad Company stationed at Randolph, Minnesota (R. 13). He was killed on December 8, 1933 at 5:10 p. m. by reason of a locomotive striking the motor car or speeder on which he was riding on the track. He was engaged in interstate commerce (R. 22).

Mr. Rambo had a section of the tracks to look after whereon it was his duty to maintain the electric signals, crossing bells, and telephone (R. 225). He operated a motor car on the track "with the understanding that trains may be run at any time upon any track in either direction" (R. 316). He was also instructed by the rules of the company not to operate his motor car "at night except when necessary", and that "in such cases a white and red light must be displayed, visible from both directions. A red and white lantern must be kept on motor cars ready for use at all time" (R. 321-323).

Rambo disobeyed these instructions. He had left his red and white lanterns in his tool house and had no lanterns on his car at the time he was killed (R. 207-208).

Rambo's hours of work were from 8:00 a. m. to 5:00 p. m. (R. 226). It was his duty to get a line-up of trains at 8:00 a. m. and 1.00 p. m., which were good for one hour only. After that if he made a move it was his duty to get a line-up before doing so (R. 226, 227). It was his duty before going on the track at all "to assure himself that all trains and sections due have passed. No notice will be given of extra trains and employes must protect themselves as prescribed by the rules" (R. 322-327).

At the time of his death, Mr. Rambo also violated these instructions. He failed to get a line-up on the train that killed him before he started out on the track, although he should have known that it had not passed (R. 242-243). Passenger train No. 8 was due to pass Hampton going South at 4:12 p. m. It had not passed at 4:55 p. m. At that time the deceased was seen at that station starting his motor car to go South toward Randolph where he lived. There was a telephone in the station at Hampton (R. 135). Rambo was not more than fifteen feet from it (R. 138). He could have communicated instantly with the train dispatcher before he left Hampton. It was his duty to do so. The station agent realizing that he was about to start out and that he had not gotten information as to trains, as it was his duty to do, ran out to warn him, but by the time he got there deceased was on his way (R. 128-133).

At 5:05 p. m. Train No. 8 passed Hampton 53 minutes late (R. 134). It had been delayed by an earlier mishap. It overtook the motor car travelling ahead of it in the same direction with the fatal result. The engineer testified:

> "I saw something down on the track; at first when I noticed it, I thought it was a dog or two running down the track. When I got a little closer I discovered it was a speeder, and I pulled the whistle. I gave a number of

short blasts and the man on the speeder never turned or looked" (R. 74).

The train was going 60 miles per hour (R. 80). The engineer tooted the whistle a number of times and set his emergency brake (R. 80). The accident happened on a straight track. It was straight for a mile or more before the point where the speeder was struck (R. 76).

The engineer testified that he was looking ahead; that he first saw the car when it was seven to nine car lengths ahead of him (R. 74). He afterwards said it might have been a thousand feet, more or less (R. 248). He did not say how far ahead he was looking. There was no evidence from any person in the engine cab that the light would not reveal a person standing erect at a distance of 800 feet if the person's eyes were directed at a point 800 feet ahead.

The only question submitted to the jury as to the negligence of the Railroad Company was whether it had complied with the law with reference to the headlight on the engine (R. 297).

There was no proof whatever offered by plaintiff as to the defective condition of the headlight. It was a standard headlight (R. 180)—a type purchased after a thorough test to see if they complied with the rule of the Interstate Commerce Commission (R. 180-181).

This particular headlight was checked by the chief electrician of the railroad company immediately after the accident and found to comply with the requirements (R. 179). The headlight was then burning brightly. There were no spots on it (R. 182). The light as then burning revealed a telegraph pole 1000 feet ahead of it (R. 182-183).

The headlight was inspected when the engine arrived at Oelwein, Iowa, and found to be in perfect condition (R.

199). It had not been touched in the meantime. It was inspected before the train left Minneapolis and found to be in perfect condition (R. 193-194).

RULINGS OF COURTS BELOW.

The District Court of Dakota County, Minnesota, held that there was evidence sufficient to go to a jury on the question whether the headlight violated the rule of the Interstate Commerce Commission and hence the Federal Boiler Inspection Act. It denied the motion of your petitioner for a directed verdict in its behalf (R. 293), and then charged the jury as follows:

> "It is the law for you to pass upon, not saying that the Railroad Company was negligent, but it is for you to consider:
>
> 'It shall be unlawful for any carrier, that is the Railroad Company, to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb.'
>
> 'It is also the law that the Interstate Commerce Commission may designate certain rules that the railroad must comply with in order to comply with this law. The Interstate Commerce Commission, Bureau of Locomotive Inspection, has passed a rule known as Rule No. 129, which reads as follows:
>
> > 'Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive engine men, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a

distance of at least eight hundred feet ahead and in front of such headlight; and such headlight must be maintained in good condition.'

"Plaintiff claims this headlight did not comply with the law and that rule, and because it did not comply with that law and rule that that was the proximate cause of the injury to Roy C. Rambo.

"The Railroad Company claims that this rule and the law with reference to headlights was complied with in every respect, and that there was nothing the matter with the headlight. The Railroad Company also claims that, even assuming the headlight was defective to some extent or entirely, that that was not the proximate cause of the accident; that the proximate cause of the accident was the failure of Roy C. Rambo to observe and obey the rules which they had promulgated for running and operating a speeder, and particularly with reference to keeping and maintaining lights on it and getting the line-ups of trains and seeing that the track was clear. The railroad company claims that this was the sole cause of the accident to Roy C. Rambo" (R. 297-298).

The District Court of Dakota County, Minnesota, denied the motion of your petitioner for judgment notwithstanding the verdict of $15,000, which was returned in favor of the respondent (R. 335-338).

Judgment was entered in favor of respondent (R. 338) and an appeal was taken to the Supreme Court of Minnesota.

The Supreme Court of Minnesota affirmed the rulings of the trial court. The opinion of the Supreme Court of Minnesota is found on pages 342-348 of the Record (263 N. W. 112) wherein the Court held:

"The only act of negligence submitted to the jury in this action for wrongful death of plaintiff's intestate

was violation of the Federal Boiler Inspection Act to inspect the headlight of the locomotive which overtook and ran him down as he was travelling after dark on a gasoline speeder, he being in the employ of defendant and both engaged in interstate traffic. It is *held* the evidence supports the verdict that there was a violation of the Act and that such violation caused, or contributed to cause, the death of plaintiff's intestate" (R. 342).

Justice Holt dissented, and his dissent is found at page 348 of the Record. He held the evidence to be conclusive that the light complied with the requirements.

A petition for re-argument (R. 349) was filed and denied (R. 353).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

Your petitioner respectfully submits that the Supreme Court of the State of Minnesota has decided a question arising under the Federal Boiler Inspection Act in a way probably not in accordance with applicable decisions of this Court, and has refused to follow the decision of this Court in the case of Chicago, Milwaukee, St. Paul & Pacific Railway Company v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, wherein this Court held that it would examine the record, and, if, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was the cause of death, it would reverse the judgment; and further held that judgment for damages for wrongful death cannot be sustained where the record leaves the question of defendant's negligence in the realm of speculation and conjecture.

The question involved is an important one to interstate carriers. It is important to them to know whether when a

train strikes an employe on the track, whose duty it is to look out for himself, who is violating the rules and his instructions, and who is totally indifferent to his own safety, they can be held liable under the Federal Boiler Inspection Act on the claim that the headlight was defective merely because the engineer did not see the employe within 800 feet when it is not shown that the engineer was trying to see 800 feet ahead.

PRAYER.

WHEREFORE Your petitioner now prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Minnesota and the Justices thereof, commanding the said Court to certify and send to this Court a full and complete record of the transcript and all of the proceedings of said Supreme Court of the State of Minnesota in this cause therein entitled, "Mary Rambo, as Administratrix of the Estate of Roy C. Rambo, deceased, Respondent, vs. Chicago Great Western Railroad Company, a corporation, Appellant—No. 30480—to the end that this cause may be reviewed and determined by this Court; and

Your petitioner prays that a certified copy of the record and proceedings in said Supreme Court, which is filed as a part of and contemporaneously with this petition, may be treated as a return to such Writ of Certiorari, and your petitioner prays that it may have such other and further remedies and relief in the premises as to this Court may seem appropriate and in conformity with law, and that judgment of the Supreme Court of the State of Minnesota in this case, and every part thereof, be reversed by this Honorable Court, and your petitioner will ever pray—

This is the first application for Writ of Certiorari in this cause.

CHICAGO GREAT WESTERN
RAILROAD COMPANY,

BY: Harry S. Stearns,

Ralph A. Stone,

Philip J. Mackey,

Attorneys for Petitioner.

STATE OF MINNESOTA,
County of Ramsey—ss.

HARRY S. STEARNS, Being duly sworn, makes oath and says that he is attorney for the petitioner in the above entitled action; that he has prepared the foregoing petition, and that the allegations therein are true as he verily believes.

HARRY S. STEARNS.

Subscribed and sworn to before me
this 2nd day of January, 1936.

ADA B. AHRENS,
Notary Public, Ramsey County, Minn.
My commission expires Dec. 21, 1940.
(Notarial Seal)

In my opinion, the foregoing Petition is well founded in law.

HARRY S. STEARNS.

IN THE

Supreme Court of the United States

October Term 1935.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of ROY C. RAMBO, deceased,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

OPINION.

One opinion was delivered by the Supreme Court of the State of Minnesota filed on the 1st day of November, 1935. It appears on page 342 of the printed record, and is reported in 263 N. W. 112. Judge Holt dissented from the majority opinion, and his opinion is found on page 348 of the printed record.

JURISDICTION, APPLICABLE STATUTES, TIMELINESS.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (U. S. C. A., Title 28, Sec. 344-B).

The decision of the Supreme Court of Minnesota was filed on November 1, 1935. A petition for rehearing was filed on November 7, 1935 (R. 349), and denied on November 14, 1935 (R. 353). Final judgment of the Supreme Court of Minnesota was entered November 14, 1935 (R. 353), and the petition and this brief are presented within less than ninety (90) days from that date.

In the trial court it was claimed by the respondent that the evidence would support a recovery under the provisions of the Federal Boiler Inspection Act, to-wit: U. S. C. A., Title 45, Sec. 23, Act of June 7, 1924, c. 355, Sec. 2, 43 Stat. 659 (Supra, pp. 2 & 3). The trial court so held and held further that under that Act alone could any recovery be sustained. Petitioner denied these claims. Petitioner's motion for a directed verdict was denied (R. 293). A verdict for $15,000 was returned for respondent (R. 307), and petitioner's motion for judgment notwithstanding the verdict was denied by the trial court (R. 338).

Petitioner appealed to the Supreme Court of Minnesota, alleging that it had been denied a title, privilege, right, or immunity under said Act, and assigned the foregoing rulings of the trial court as error (R. 341). The State Supreme Court affirmed the judgment of the trial court (R. 342).

The decision by the Supreme Court of Minnesota was a decision by the highest court in which a decision might be had in the state.

The decision upon the question whether there was evidence sufficient to sustain a finding that the Federal Boiler Inspection Act had been violated was necessary to a determination of said cause. It was actually decided in the affirmative by the Supreme Court of Minnesota, and there was

in the case no non-federal ground broad enough to sustain the judgment.

FACTS IN BRIEF.

The facts are stated in the petition for the Writ of Certiorari on pages 4 to 7 thereof. We emphasize in addition the following facts:

There was testimony in the record of a 15-year-old boy who lived adjacent to the track. After he heard the speeder and heard the train, he looked away from the track. He looked "toward the cornstalks to see if there was a chicken there" (R. 102). Then when he looked back at the track again he saw the speeder. He never testified at any time that he could not see the speeder until the train came within 100 feet of it. His testimony has no bearing upon the question whether the headlight was defective. Attention is called to the petitioner's petition for re-argument, filed in the Supreme Court of Minnesota (R. 349-351).

SPECIFICATION OF ERRORS INTEND TO BE URGED.

The Supreme Court of Minnesota erred in affirming the judgment of the District Court of Dakota County, Minnesota, in favor of respondent and against defendant in the sum of $15,800.72, and, by so doing, holding the evidence sufficient to sustain a recovery under the Federal Boiler Inspection Act.

ARGUMENT.

I.

There was no evidence to sustain a finding of the violation of the Federal Boiler Inspection Act where the only evidence of a defective headlight on the engine was the testimony of the engineer that he did not see deceased within 800 feet ahead of the engine, and where the headlight was shown to be in perfect condition before and immediately after the accident.

The rule (R. 297-310) (Petition p. 3) requires that a locomotive shall, between sunset and sunrise, have a headlight which shall afford sufficient illumination to enable a person in the cab of the locomotive, who possesses the usual visual capacity required of locomotive engineers, to see, in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight. There was no proof that this headlight did not meet these requirements. Immediately after the accident it was tested by the chief electrician of the petitioner, who happened to be on the train, and it revealed the seventh telegraph pole, over 1000 feet ahead (R. 182-183). Tested before leaving Minneapolis, it was found in perfect condition (R. 193-194), and was in perfect condition on arrival at Oelwein, Iowa (R. 199).

Because the engineer said that when he first saw the moving object in front of him it might have been seven, eight, or nine car lengths ahead of him (R. 74), or perhaps one thousand feet (R. 248), respondent claimed it could be inferred that the headlight was defective. He could not have known how far it was away when he first saw it because he was on

an engine moving 60 miles per hour, overtaking another object moving in the same direction. His minimum estimate of seven car lengths was manifestly only a guess. It was pure conjecture, whether or not the engineer first saw the speeder in less than 800 feet, but if it was less than 800 feet before he discovered the speeder, no proof is made out of a defective headlight.

The rule requires a headlight that will reveal a man standing erect at a distance of 800 feet. The rule assumes that if both man and engine are standing still, the man should be revealed at 800 feet. If that test is met, the rule is complied with. It is not shown to be violated because the man on the engine did not see the railroad speeder with a man sitting on it and moving in the same direction.

There was no proof that, although the engineer was looking ahead, his eyes were fixed on a point 800 feet ahead. His gaze may have been directed to a point 200 feet in front of the engine or 500 feet in front of the engine, or immediately in front of the engine. To make any proof of a defective headlight, plaintiff must first prove that the engineer's eyes were fixed on a point 800 feet ahead. There was no such proof.

Even making the unproven assumption that the engineer's eyes were fixed on a point not less than 800 feet ahead (which is a pre-requisite to any claim that the headlight was proven to be defective), still the proof fails to sustain any claim of a defective headlight.

The test is whether the headlight on a standing engine will disclose a man standing 800 feet ahead. Proof that at a speed of 60 miles per hour, an engineer would not discover a man sitting on a moving speeder, does not show a failure to meet the test because of the dissimilarity of the condi-

tions. Another pre-requisite would be necessary to such proof. It would be necessary to prove that a man on a moving speeder was just as visible an object to a man on a moving train as a man standing erect on the track. The eye does not pick up an object moving away from it at night as quickly as an object standing still. At least the burden was upon the plaintiff to prove that it did. This was not done. Proof of failure to see a moving speeder with a man sitting on it, at 800 feet, is not proof that the headlight would not reveal a man standing erect at that distance, because:

(1) There was no proof that the eyes of the engineer were fixed upon the spot as far ahead as 800 feet, and

(2) There was no proof that the moving speeder with a man sitting on it was as visible as a man standing erect on the track.

To say that this light did not comply with the test is the purest speculation in this case. The respondent wholly failed to prove any violation of the Federal Boiler Inspection Act. Respondent failed to show at what distance a man standing erect could be seen with this light. The rule is not shown to be violated because a moving object, close to the ground, with a man sitting on it, is not seen sooner by an engineer who is not shown to be looking as far as 800 feet ahead.

II.

Even if the headlight were defective, it was not the proximate cause of the accident.

A train traveling 60 miles per hour strikes a railroad motor car traveling ahead of it at night. The engineer does not see the car until it is too late to avoid striking it. The negli-

gence of the engineer is out of the case by the Court's charge. He is not to be found negligent because he did not see the car. He did everything in his power to avoid the accident after he discovered the peril—that is conceded.

The doctrine of last clear chance does not apply in an action of this kind until it appears that the engineer actually saw the deceased and knew of his peril. It conclusively appears that the engineer did everything in his power to avoid the accident.

The claim of negligence is not that the engineer could have seen the deceased sooner with a different light. The claim is that the deceased might have seen a more powerful light and been warned thereby. But of this there is no proof. It is nothing more than surmise. Even if the candle power of the light had been one or two greater, it does not follow logically that the deceased would have been warned thereby, any more than with a weaker light. He was regardless of his own safety. He went out on the track without ascertaining if a train was coming. It was his duty to do so. He did not hear warning blasts of the whistle which were given in plenty of time so that he could have jumped out of the way (29, 74). "He never turned or looked" (74).

How then can it be assumed that he would have been warned by a little brighter light. Such conjecture does not reach the dignity of proof.

The uncontradicted proof is that the train would have struck deceased anyway, even if the engineer discovered deceased at a distance of 800 feet. There is no proof that he did not discover him before within 800 feet. But even if he did not, it makes no difference. Just discovering him at 800 feet the train would have struck the motor anyway. At the speed the train traveled, it could not stop in less than 2,000 feet (837-843).

III.

The negligence of the deceased employe was the sole proximate cause of his death, and is, therefore, a complete defense under the Federal Act. The question of proximate cause was for the Court.

Unadilla Ry. vs. Caldine, 276 U. S. 139, 73 L. Ed. 224;
Davis vs. Kennedy, 266 U. S. 147, 69 L. Ed. 212;
Frese vs. C. B. & Q. R. R. Co., 263 U. S. 1, 68 L. Ed. 131;
G. N. vs. Wiles, 240 U. S. 444, 60 L. Ed. 732;
McCalmont vs. P. R. R. Co., 273 Fed. 231;
Certiorari denied, 260 U. S. 751, 67 L. Ed. 495;
Southern Ry. vs. Gray, 241 U. S. 333, 60 L. Ed. 1030;
C. M. & St. P. vs. Coogan, 271 U. S. 472; 70 L. ed. 1041.

That the deceased was negligent was proven beyond any question. He violated the rules. He carried no lanterns. He did not get information as to trains. He did not watch out for trains. He knew it was his duty to keep out of the way.

The Railroad Company owed deceased no duty to look out for or warn him of the approach of the train. It was his duty to look out for and keep out of the way of the train.

Connelly vs. Penn. R. Co., 228 Fed. 322;
Aerkfetz vs. Humphreys, 145 U. S. 418, 36 L. Ed. 758;
Chesapeake & Ohio vs. Nixon, 271 U. S. 218, 70 L. Ed. 914.

The Nixon case was distinguished in

Rocco vs. Lehigh Valley R. Co., 288 U. S. 275, 77 L. Ed. 743;

where (1) the accident happened on a blind curve; (2) the workman's view was obscured; (3) the train was required to

give warning when approaching the curve but failed to do so; and (4) the presence of Rocco on the track at the point should have been expected by the engineer.

In the case of Bernola vs. Penn. R. Co., 68 Fed. (2) 172, a trackman was killed by an extra unscheduled train traveling 50 miles per hour. No signals or warnings were given. The Court, following the general rule and not the exception alluded to in the Rocco case, held that the Railroad Company owed no duty to the deceased to give him any warning; that failure to give any warning whatever of the approach of the train was not negligence; that the proximate cause of the accident was the failure of Bernola to watch for the approach of trains.

The decisions in Minnesota fully sustain the argument that it was the duty of deceased to watch for trains; that failure to do so is the proximate cause; that the Company owes no duty to the trackman to warn him.

See:

May vs. C. M. & St. P. R. Co., 147 Minn. 310, 180 N. W. 218;

Greisch vs. M. St. P. & S. S. M. R. Co., 160 Minn. 83, 199 N. W. 517.

Decisions of other State Courts are to the same effect:

Dozier vs. Mo. Pac. R. Co., 176 Ark. 651, 3 S. W. (2nd) 678;

Norfolk & W. R. Co. vs. Smith, 152 Va. 165, 146 S. E. 268;

Cincinnati &c. R. Co. vs. Swann, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915 C, 27.

There is no proof that a light ten times more powerful would have overcome the effects of the negligence of the de-

ceased. To so find is to base liability upon a mere guess. The negligence of the deceased was the sole proximate cause and defendant is not liable.

IV.

CONCLUSION.

The question is whether the courts administering the Federal laws should be required to follow the decisions of this Court with reference to the sufficiency of proof. The lower court has not done so in this case, and a review and reversal by this court is the only way in which the courts of the State of Minnesota can be made to heed the decisions of this Court. There was no more proof of liability in this case than there was in the case of C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041. The verdict of $15,000, resting upon pure speculation, will have to be paid unless this Court will review the case and reverse the lower court.

Respectfully submitted,

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